

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.08.2013

CORAM

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

A.S.No.500 of 1998

Sarbunnisha .. Appellant / Plaintiff

Vs.

1. Rasool Beevi
2. Usman Ali
3. Sirajunnissa
4. Abdul Wahab
5. Foujia Begum
6. Abuthalip
7. Sheik Alaudeen
8. Mohamed Ali .. Respondents / Defendants

Prayer:- Appeal Suit filed under Section 96 of Code of Civil Procedure against the Judgment and Decree dated 21.08.1998 and made in O.S.No.110 of 1996 on the file of the Additional District Judge, Pondicherry.

For appellant : Mr.T. Susindran

J U D G E M E N T

The plaintiff in O.S.No.110 of 1996 on the file of the Additional District Court, Pondicherry at

Karaikal, is the appellant. The plaintiff/ appellant filed the suit for partition. The suit was dismissed and aggrieved by the same, the present appeal is filed.

2. The case of the plaintiff/ appellant as per the plaint is as follows: The suit property belonged to one Mohamed Sulthan, the father of the plaintiff/ appellant. Mohamed Sulthan had two wives and the plaintiff/ appellant is the daughter of Mohamed Sulthan through his 2nd wife. The 1st defendant is the widow of Mohamed Sulthan and she is the 2nd wife and the 2nd defendant is the son of the 1st defendant through Mohamed Sulthan. Mohamed Sulthan died on 7.2.1989 and during his life time he executed two registered settlement deeds dated 2.7.1975 bequeathing the 'A' schedule properties and 'B' schedule properties under those two settlement deeds. According to the plaintiff, the settlement deeds are not valid as per Mahomedan Law and Mohamed Sulthan retained the right of enjoyment of property settled under those settlement deeds with himself and he also sold certain items of properties covered under the settlement deeds to the defendants 3 to 8 and therefore the settlement deeds are not valid and the plaintiff is entitled to 7/24 share in the suit properties.

3. The 1st defendant and 2nd defendant filed the statement stating that the settlement deeds are valid and under the settlement deeds the 1st defendant became the absolute owner of the properties and neither the plaintiff nor the 2nd defendant is entitled to claim any share in those properties. It is also stated that the 1st defendant was put in possession of the properties under the settlement deeds and the rents and profits from the properties were received by Mohamed Sulthan only on behalf of the 1st defendant and not on his own account and in all those sale deeds the 1st defendant also joined her husband Mohamed Sulthan and that would also prove that the gift was valid and the 1st defendant also accepted the gift and she was also put in possession of the properties and the plaintiff therefore cannot claim any right over the same.

4. The 3rd defendant who purchased Item- I of 'B' schedule properties contended that the settlement deeds in respect of 'B' schedule properties is valid and Mohamed Sulthan and his wife the 1st defendant were in possession of the properties and they also handed over possession and she has also put up construction in Item-I of 'B' schedule properties and therefore the suit is liable to be dismissed insofar as the Item-I of 'B' schedule properties is concerned.

5. On the basis of the above pleadings the trial Court framed the following issues:

(1) Whether the Court fee paid for the suit property is not correct ?

(2) Whether two settlement deeds dated 2.7.1975 executed by Mohamed Sulthan is not valid and acted upon?

(3) Whether the plaintiff is entitled to partition of the property. If so what would be her share ?

(4) To what other relief the parties are entitled to ?

6. The plaintiff examined as PW1 and marked five exhibits on her side and on the side of defendants no witnesses were examined and no documents were marked.

7. The trial Court answered Issue No.1 holding that the plaintiff paid *advolorem* Court fee under Section 37(1) of the Pondicherry Court Fees and Suits Valuation Act as per the earlier decision rendered in that suit and therefore no further finding is required in respect of that issue.

8. Issue No.2 was discussed elaborately by the trial Court with reference to the various Judgements of this Court and other High Courts and the trial Court held that the two settlement deeds executed by Mohamed Sulthan are valid and they were acted upon as per the intention of the donor.

9. Issue No.3 was answered against the plaintiff holding that the plaintiff was not entitled to any

share in the 'C' schedule properties. In the result, the suit was dismissed and aggrieved by the same, this appeal is filed.

10. The learned counsel for the appellant submitted that the reading of various clauses in the settlement deeds would make it clear that the settlement deeds are not valid as per Mahomedan Law as there was no complete relinquishment of ownership by the donor and the donor retained the right to collect usufruct during his life time in respect of both properties which is against the concept of gift under the Mahomedan Law and therefore the gift is not valid and when the gift is not valid the plaintiff who is the daughter of Mohamed Sulthan is entitled to 7/24 share and the trial Court ought to have granted the preliminary decree.

11. The learned counsel for the appellant also submitted that the gift was not acted upon and the same was evidenced by the admission of 3rd defendant who purchased the Item-I of 'B' schedule properties from Mohamed Sulthan and from the 1st defendant and if Mohamed Sulthan had relinquished his right or ownership over the 'B' schedule properties under the settlement deeds, there was no necessity for Mohamed Sulthan to join in the execution of sale deed with his wife in respect of Item-I of 'B' schedule properties. That would also prove that Mohamed Sulthan did not relinquish his right over the properties. He further contended that even the 1st defendant was not given absolute interest and she was given only life interest and vested remainder was given to the son of the 1st defendant to be enjoyed absolutely and that is also against the concept of gift as per the Mahomedan Law and therefore the Court below erred in holding that the settlement deeds are valid under Mahomedan Law.

12. On the basis of the above submission, the following point that arises for consideration in the First Appeal is:

Whether the settlement deeds Exs.A1 and A2 executed by Mohamed Sulthan are valid as per Mahomedan Law ?

13. Admittedly, Mohamed Sulthan was the owner of 'A' and 'B' schedule properties and in respect of 'A' schedule properties he executed the settlement deed on 2.7.1975 and in respect of 'B' schedule properties he executed another settlement deed on the same date and both settlement deeds were marked as Exs.A1 and A2. The recitals in both settlement deeds are common and that has been incorporated by the trial Court and the same is as follows:

VERNACULAR (TAMIL) PORTION DELETED

14. To appreciate the contention of the learned counsel for the appellant we will have to see the essential ingredients of the gift under the Mahomedan Law. In the Judgement reported in AIR 1966 SC, 1194 in the case of Magbool Alam Khan Vs. Khodiaja and others, the Hon'ble Supreme Court held as follows:

□ The Three pillars of a valid gift under the Mahomedan Law are declaration, acceptance and delivery of possession. There can be a valid gift of property in the possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities still take the view that a property in the possession of a usurper cannot be given away, but this view appears to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid, provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the

donee to obtain in possession. □

15. As per Section 149 of Mahomedan Law by Mulla 19th Edition, there are three essential ingredients of a gift and they are (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee and (3) delivery of possession of the subject of the gift by the donor to the donee and the delivery of possession may be actual or constructive.

16. In this case, a reading of Exs.A1 and A2 would make it clear that the donor expressed his intention to gift the properties and a clear declaration of gift was made by the donor in favour of the 1st defendant and her son the 2nd defendant. Therefore, the 1st contention is satisfied. It is admitted by the 1st defendant the wife that she accepted the gift and as a matter of fact both Mohamed Sulthan the husband and wife the 1st defendant jointly sold the 1st Item of 'B' schedule properties to the 3rd defendant and that would also prove that the gift was accepted. Admittedly, the donee is the wife and both husband and wife are residing in the same house and the delivery of possession can also be constructive and need not be actual and considering the fact that the donee is living in the same property and she also accepted the gift. The third ingredient is also satisfied. Therefore, the essential ingredients to prove the gift was satisfied in this case and therefore the gift is valid.

17. The contention of the learned counsel for the appellant is that under the gift deeds Exs.A1 and A2 life estate was given to the 1st defendant, the wife and vested remainder was given to the 2nd defendant and the donor also retained the right to enjoy the usufruct till his life time and these recitals in the settlement deeds are against the concept of gift and therefore the retention of right to enjoy the usufruct and giving life estate to the 1st defendant, the wife would prove that the gift is not valid as per Mahomedan Law.

18. I am unable to accept the contention of the learned counsel for the appellant. It is stated in Mahomedan Law by Mulla 19th Edition that Mahomedan law makes a distinction between the corpus of the gift (Ayn) and the usufructs (Manafi). A reservation of rights in manafi, so long as the ayn is transferred, does not render the gift bad. If however, possession of the corpus is reserved, the gift will be bad. *Mundayat Vedake V. Chiru Kandan* 1971 K.L.J.796.

19. Further, the Division Bench of this Court in the Judgement reported in 1979 Madras, 193 (Jameela Beevi and others Vs. Sheik Ismail) held as follows:

" It is well established that in order to constitute a valid gift under the Mohamedan Law, the three necessary elements which constitute such a gift are, a declaration of gift by the giver, the acceptance of the gift by the donee which acceptance may be expressed or may be inferred by necessary implication and lastly delivery of possession of the subject-matter of the gift by the donor to the donee. But in the course of time certain exceptions have been engrafted in the matter of upholding of a gift notwithstanding immediate delivery of possession of the subject-matter of the gift. One such exception is a case where the donor without reserving dominion over the corpus of the property or any share therein, stipulates only for a right to enjoy the income from the property during his life time or makes the gift subject to a condition that the donee shall pay the whole of the income from the property or that part thereof to a person of his choice during the lifetime of such a person. Though this appears to be an apparent exception to the generality of the rule embodying the three conditions which would make a valid gift, yet it is not really an exception. Reservation of a right to enjoy the income, though ordinarily called a life estate does not militate against the validity of the gift because the corpus of it is absolutely given over to a named individual and the condition whereby the income should be enjoyed either by the donor or his nominee does not detract from or violate the essence of a valid gift. If in a given illustration the subject-matter of the gift is sliced away by the donor, or the condition or restriction contemporaneously imposed by the donor is so

obvious that one would understand the gift as taking away a portion of the corpus of the gift, then Mohamedan Law does not accept it as a valid gift. The reason is obvious. By imposing such a restriction as above, the entirety of the property which is the subject-matter of the gift is not given away but only a portion thereto. This is not possible to make it a valid gift. If, however, the restriction or the condition is such whereby a right to enjoy the income from the gifted property is contemplated, and whether such enjoyment is by the donor or by his nominee, it would not tantamount to the taking away of a portion of the corpus of the property, but it is only a temporary right to enjoy the usufruct therefrom. "

20. Further as per Sections 152(3) and 153 of Mahomedan Law by Mulla 19th Edition that no physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift.

The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account.

21. Therefore, having regard to the Division Bench of this Court in the Judgement reported in 1979 Madras, 193(Jameela Beevi and others Vs. Sheik Ismail), even assuming that the donor retains the right to enjoy the usufruct till his life time, the gift will not become invalid on his account as the corpus has been transferred in favour of the donee.

22. Further, as per Section 164 of Mahomedan Law by Mulla 19th Edition that when a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no conditions were attached to it. Therefore, even assuming that creation of life estate in favour of the donor is contrary to the concept of gift as per Mahomedan Law having regard to Section 164 of Mahomedan Law by Mulla 19th Edition becomes void and the gift becomes valid and the donee gets absolute right over the gift to her. The trial Court also dealt with in detail about the law of gift as per Mahomedan Law with reference to various Judgements and also held that the sale by Mohamed Sulthan in favour of the 3rd defendant along with his wife, the 1st defendant would only prove that the gift was accepted by the 1st defendant and as the donor retained the life estate he also joined in the execution of the sale deed. Considering all these aspects, I do not find any infirmity in the findings of the trial Court and I hold that the settlement deeds Exs.A1 and A2 are valid under law and as per the settlement deeds the 1st defendant is the absolute owner of the suit properties and the point for consideration in the above issue is answered against the appellant.

23. In the result, the Judgement and Decree of the trial Court are confirmed and the Appeal Suit is dismissed.

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To

The Additional District Judge,
Additional District Court,
Pondicherry at
Karikal